

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30750
Docket No. MW-31462
95-3-93-3-469

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Terminal Railway Alabama State Docks

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day suspension imposed upon Track Repairman C. D. Gildersleeve on July 20, 1992, for alleged failure to properly perform his duties in a safe manner in connection with the damage to Truck Crane No. T-584 on July 15, 1992, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 19(f)."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On July 15, 1992, Claimant loaded used rails into two push carts hooked to the rear of Truck Crane No. T-584. When backing up, the rear push cart derailed one set of trucks. Claimant attempted to rerail the push cart using the boom to lift the rail off the push cart. The middle section of the boom sustained damage.

On July 20, 1992, Claimant was assessed a five-day suspension because, "The crane boom was totally destroyed when you overloaded the crane attempting to pick up more than its safe capacity," and because he failed to perform his duties in a safe manner. On July 29, 1992, Claimant requested a Hearing pursuant to the Agreement. The Hearing was held on August 14, and on August 24, 1992, Claimant was advised that the five-day suspension would stand.

The Organization argues that Carrier notified Claimant of one charge, but proved a different charge. The Organization urges that there is no dispute that only the middle section of the boom was damaged. The Organization notes that the August 24, 1992, letter relies on "extensive structural damage" to the boom, but that Claimant was charged with totally destroying the boom.

The Organization contends that Carrier failed to prove Claimant's responsibility for the damage. The Organization argues that the boom was not functioning properly at the time of the incident and that Claimant was performing the rerailing in the usual manner by which such job was performed. Furthermore, the Organization observes that neither the Foreman nor the Roadmaster saw the accident. In the Organization's view, the record did not substantiate Claimant's responsibility for the incident. That responsibility is based only on the speculation of people who did not see the accident occur.

Carrier contends that it afforded Claimant a fair Hearing and proved the alleged violation. Carrier observes that the crane had instructions related to proper angles and loads for lifting on a side panel. Carrier contends that Claimant's own testimony established that he did not pay attention to those instructions, nor show due regard for the crane's load limits.

The Board does not agree with the Organization's contention that there was a discrepancy between the charge and the finding. The July 20, 1992 letter erroneously stated that the crane boom had been totally destroyed. Carrier admitted the error on the property. There was no dispute that the boom was damaged. The focus of the Investigation was on Claimant's responsibility for the damage.

The Board reviewed the record developed on the property. Claimant testified that he set the boom at approximately a 45 degree angle. The Roadmaster testified that the boom's capacity at a 40 to 45 degree angle was 1500 - 1600 pounds. The Roadmaster estimated that the push cart contained fifteen 33 foot rails, each weighing 90 pounds per three feet of rail. Claimant testified that the push cart contained eight or nine rails of varying length, up to thirty-three feet, ranging in weight from 75 to 90 pounds per three feet of rail.

If the Roadmaster's testimony is accepted, the boom was overloaded. If Claimant's testimony is accepted, the boom was not overloaded. We do not make such findings de novo. We are bound by the factual resolution made on the property where the Hearing Officer had the opportunity to observe the witnesses and assess their credibility.

We recognize that the Roadmaster did not see the accident. However, he arrived on the scene shortly thereafter and observed the load in the push cart.

Furthermore, Claimant's own testimony indicated a lack of due regard for the safety of the crane. Claimant stated that he really did not have time to watch angles for the boom. "We go out there and we know about how far to lift the boom to pick up certain things. After you do a thing for a certain length of time you do not have to watch that." The fact that the use of the crane to rerail a push cart may have been a common practice does not excuse the need to ensure that it will be a safe practice in each instance.

We conclude that substantial evidence supports the finding made on the property that Claimant did not show due regard for safety and overloaded the crane. Although the crane was not totally destroyed, the boom suffered substantial damage. We are unable to say that the penalty imposed was arbitrary, capricious or excessive.

AWARD

Claim denied.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.